SUPREME COURT, U. S.

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No. 1066

In the

Supreme Court of the United States

OCTOBER TERM, 1969

CITY OF PHOENIX, ARIZONA, and MILTON H. GRAHAM, FRANK G. BENITES, CHARLES CASE, JOHN J. LONG, MILTON SANDERS, MRS. DOROTHY THIELKAS, DR. MORRISON F. WARREN, Members of and constituting the City Council of the City of Phoenix, Arizona,

Appellants,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal From The United States District Court
For The District of Arizona

BRIEF FOR THE PARISH SCHOOL BOARD OF CADDO PARISH, LOUISIANA, AS THE GOVERNING AUTHORITY OF PARISH-WIDE SCHOOL DISTRICT OF CADDO PARISH, LOUISIANA, AS AMICUS CURIAE

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MAY IT PLEASE THE COURT:

This brief is filed on behalf of Parish-Wide School District of Caddo Parish, Louisiana, a political subdivision of the State of Louisiana, and is sponsored by the Parish-Wide School District Attorney, the authorized law officer thereof under Rule 42(4) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

The extent to which a decision affirming the decision of the lower court should apply to bond elections held, and bonds delivered, prior to the date of the decision by this court, and to bond elections conducted thereafter.

INTEREST OF AMICUS CURIAE

Pursuant to resolution duly adopted by the Parish School Board of Caddo Parish, Louisiana, on April 23, 1969, a special election was held in Parish-Wide School District of Caddo Parish, Louisiana, on May 27, 1969, at which there were submitted to the qualified taxpaying voters of the school district, pursuant to the Constitution and Laws of the State of Louisiana, three propositions. Proposition Number One was for the levy of a special three mill tax for maintenance purposes, Proposition Number Two was for the levy of a special four mill tax for construction purposes, and Proposition Number Three was for the issuance of school bonds in the amount of $10,000,000, payable from unlimited ad valorem taxes. The election at which such propositions were submitted was duly held and conducted on May 27, 1969, and on May 29, 1969, the Parish School Board of Caddo Parish, Louisiana, met and canvassed the results of the election, and found that the majority in number and amount of the qualified taxpaying voters of said district, voting at said election, was in favor of each of said propositions. The results of said election were promulgated by publication of the proces verbal of the election on June 13, 1969. The peremption period provided in R.S. 39:518, and Section 14(n), Article 14, of the Constitution of the State of Louisiana, expired without challenge to the validity of the bonds or to the propositions for special millage taxation, on August 12, 1969.

On June 16, 1969, this Court decided the cases of *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, and *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647. Under the wording of the *Cipriano* case the question of the applicability of the rationale of the *Kramer* case to the validity of taxpayer qualifications at general obligation bond elections was not decided.

The complaint in this case was filed on August 1, 1969, prior to the expiration of the state contest period with respect to the May 27, 1969 election held in Parish-Wide School District of Caddo Parish, Louisiana. The United States District Court for the District of Arizona, in its opinion of November 17, 1969, held the Phoenix election involved in this appeal invalid as to both the revenue and the general obligation propositions submitted at that election, irrespective of the fact that, as the court noted in its opinion: "Under Arizona law the period during which an elector may contest an election is limited to five (5) days following the canvass of the election and the declaration of the results thereof. 16 A.R.S. 1202, 1204." Jurisdictional Statement of Appellant, Page 18. Inasmuch as the lower court applied the *Cipriano* decision to general obligation bond elections, disregarding the passage of the state contest period, the practical effect of such decision, and the pendency of such litigation and this appeal, has been to prevent the Parish-Wide School District of Caddo Parish, Louisiana, and all similarly situated political subdivisions, from successfully obtaining bids for the sale of the bonds voted at the May 27, 1969 election. The very question in this appeal applies to the validity of the bond election held in the Parish-Wide School District of Caddo Parish, Louisiana, and until the resolution of this case on this appeal, the School Board of Caddo Parish, Louisiana, cannot hope to obtain bids for the sale of the bonds voted at the May 27, 1969 election.

A brief description of the impact of this delay on the financial programs contemplated by the Caddo Parish School Board is in order. The May 27, 1969 bond election was the result of a recommendation presented to the board by a Citizen's Advisory Committee. This report contemplated a four mill special tax to produce approximately $10,000,000 over a five year period and in addition the $10,000,000 general obligation bond issue was proposed to provide a total of $20,000,000 for capital improvements during the period.

At the present time the board is levying the five mill tax which is the sole source of revenue for the improvement program. The failure to be able to sell the bonds has resulted in a marked slowdown in the schedule of the improvement program. One example is the pressing need of the community for the construction of vocational-technical school facilities, but the necessary funds have not been available for the board to begin construction on the designated site.

In the absence of the needed capital improvements resort has been had to temporary facilities with a consequent reduction in program offerings. At the present time 135 temporary classrooms are being used to supplement permanent facilities.

In the Vivian area of the school district, prior plans called for the demolition of existing schools and replacement with modern construction. This has been deferred, hence under the impact of the court ordered unitary system, the students in this area are bused ten miles to another school where space is available.

The delay in receipt of the proceeds of the bond issue is seriously affecting the capability of the Caddo Parish School Board to implement the court order for the unitary system. The portion of the order requiring the realignment of the schools from a K-6 and 3-3 program

to a K-5 and 3-4 program will also require additions and major modifications to many of the existing plants.

A continued lack of funding capacity can only result in the reduction of offerings, overcrowded conditions, temporary facilities and the lack of opportunity for all segments of the community. The school authorities find themselves at this time approximately two years behind in a five year, carefully planned development program.

SUMMARY OF ARGUMENT

In the *Cipriano* case, this court recognized the necessity of applying its decision prospectively only, and thereby did not cast doubt on the validity of revenue bonds actually delivered and issued prior to the date of that decision. There is no reason to believe that this Court, if it affirms the decision of the lower court, will hold differently as to the retroactive effect of its decision with respect to general obligation bond issues which are outstanding in the hands of the purchasers thereof on the date of the opinion in this case.

However, difficult and substantial questions of interpretation have arisen as to the meaning and the application of the language in the Per Curiam opinion of this Court in *Cipriano,* at least as applied to bond elections held prior to June 16, 1969 where bonds voted at such elections were not issued and in the hands of the purchasers on June 16, 1969. It is the desire of the *Amicus Curiae* in this brief to discuss the problems which have arisen under the prospective language used in the *Cipriano* opinion and to respectfully suggest methods which might be considered by this Court, assuming, *arguendo,* that the decision of the lower court is to be affirmed, when determining the retroactive and prospective application of its decision to other than the bond election held in the City of Phoenix and which is the subject of this appeal.

ARGUMENT

As urged in the briefs filed *Amicus Curiae* in this Court in the *Cipriano* litigation for the Salt River Project Agricultural Improvement and Power District, for the State of Louisiana, and for the Louisiana Municipal Association, this Court in the opinion in *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, recognized the significant hardships which would be present if the decision in that case were to be given full retroactive effect. The *Cipriano* opinion makes clear that the validity of bonds actually delivered and in the hands of purchasers prior to the date of that decision on June 16, 1969 cannot be challenged. As pointed out in such briefs filed with this Court in the *Cipriano* case, prior decisions of this Court, which need not be cited again to the Court in this brief, provide adequate authority for this Court to make its decision in this case prospective only, so that the millions of dollars of outstanding general obligation bond issues issued in the states which have heretofore required property tax qualifications at bond elections, will not be affected and no question may be raised as to the validity of those outstanding bonds. *Amicus Curiae* however respectfully suggests that this Court specifically reiterate that an affirmance of the decision of the lower court will not affect in any way the validity of the outstanding general obligation bonds.

The pertinent language of this Court in the *Cipriano* case dealing with the prospective nature of the opinion is as follows:

> Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given

> full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940). Cf. *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final. Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision. Of course, our decision will not affect the validity of securities which have been sold or issued prior to this decision and pursuant to such final authorization. 395 U.S. at 706.

This language has raised numerous questions of interpretation, as applied to both general obligation and revenue bond issues under various state laws, and it is the desire of this brief to respectfully suggest to this Court methods of interpretation or application which might be adopted by this Court when setting forth the retroactive versus prospective nature of a decision in this appeal.

One of the results of the *Cipriano* decision has been to cause the filing of many lawsuits questioning the validity of bond elections. Some of the lawsuits have been occasioned by the fact that this Court was unable to treat both general obligation bonds and revenue bonds in the *Cipriano* opinion. This was, of course, unavoidable, but now that this Court has a case before it dealing with

the general obligation bond question, and recognizing the somewhat difficult problem of applying this type of a decision to situations involving many different types of state laws, it is desired to suggest guidelines to the Court for consideration.

It appears that part of the problem of interpretation of the *Cipriano* opinion arises from information given to the Court at the oral argument during presentation of the *Cipriano* case. Rebuttal argument of Kenneth Watson, Esquire, on behalf of the Appellant in the *Cipriano* case, Transcript, page 37 and 38, reads as follows:

> Q. Can you tell us whether every State has a finality period for contesting a bond issue? That finality period, that is measurable in months rather than years?
>
> A. No, sir, I can't off-hand tell you that, your Honor. I would be glad to have that matter checked and submit it to the court if the court would feel that it would want it. But I am not prepared to give the court that statement of fact as to the number of States that require months instead of years.
>
> I would certainly assume, however, as Mr. Huppenbauer has actually argued, that every State has some period that at some point you have to have a finality for somebody to buy the bonds.
>
> Q. I am sure of that, but in terms of years a decision such as you are requesting might very well be extremely disruptive and a great deal of money.
>
> A. I will only suggest that the question of years is in all probability not in play here, your Honor, as who would want to wait years before they could sell a bond? And I am sure nobody would want to buy a bond when the matter had not become final as Mr. Huppenbauer had suggested.

> They have to have an opinion from a competent bond attorney and these competent bond attorneys must certainly certify that the time for challenge has passed. I am sure no issuing authority would want to wait several years before they issued bonds.

This argument suggests that all the states have statutory peremption provisions similar to those contained in the statutes and Constitution of Louisiana, but it is not in fact accurate. In fact, Louisiana is one of the few states which has a prescriptive or peremptive period which has been consistently interpreted by the state court to prevent the questioning of bond elections, even on constitutional grounds, after the applicable sixty day period has elapsed. In addition to the diversity of state laws on the subject, there is the fact that in some states there is no applicable statute or constitutional provision which, under the reported decisions of the state court, has been held to apply to a bond election in the sense presented to this Court under Louisiana law as involved in *Cipriano*. So that the Court might be able to examine the diversity of state law provisions on the subject, we set forth the following discussion of the various state laws which we have been able to determine to have any relevance to this problem.

The statutory periods within which bond elections can be contested in the various states having some form of property or taxpayer requirement are in some instances very definite whereas in other instances they are both indefinite and unclear. In Alaska, *Alaska Statutes* Section 15.20.540 and Section 15.20.550 apply to state election contests. In *Turkington* v. *City of Kachemak*, 380 P.2d 593 (Alaska, 1963), the Supreme Court of Alaska held that since no statutory procedure had been prescribed for con-

testing local elections the procedure provided for contesting state elections could be followed, but did not decide if the passage of the statutory period would bar future challenges.

In Arizona, *Arizona Revised Statutes* Section 16-1204 provides that an "elector" may contest an election held in a county, city, town or political subdivision thereof, and by reference to Section 16-1202 provides that the contest must be begun within five days of the canvass and declaration of results. One question immediately arising from this language is that of whether or not a non-taxpayer precluded from voting at a bond election could contest the election at all in that he is not an "elector". Such a question becomes very significant in a situation such as the one now before this Court wherein non-property taxpayers are precluded from being electors and, arguably, could therefore be said to be prevented from raising the fact that they were not permitted to vote at the election. Section 35-454B, concerning bond elections, incorporates by reference these general election laws. A further problem arises from the fact that in referring to counties, cities, towns, and their political subdivisions Section 16-1204 makes no provisions for contesting elections held in other political subdivisions of the state. Section 16-1201 contains provisions for contesting statewide elections but contains no provisions for contesting elections of political subdivisions of the state. The hiatus created as a result of the incomplete language of these two sections, namely whether or not there is a contest statute applicable to elections held in political subdivisions of the state not enumerated in Section 16-1204, is demonstrated in such cases as *Scharer* v. *Bell*, 34 Ariz. 334, 271 Pac. 715 (1928) and *McCall* v. *City of Tombstone*, 21 Ariz. 161, 185 Pac. 942 (1919), where the courts recognized the uncertainty

of the application of the election contest statute. A final problem presented by these Arizona statutory sections is that in the absence of a statutory contest period applicable to a given election an Arizona court might be willing to overthrow the results of an election subsequent to the aforementioned five day period. This is evidenced by the case of *Morgan* v. *Board of Supervisors,* 67 Ariz. 133, 192 P.2d 236 (1948). In that case a school board election was attacked, the plaintiff contending that the school trustees, the election board, and other officials of the district had interferred with the fairness and freedom of the bond election. The case was *not* brought under an election contest statute, but the court stated that the trial court had jurisdiction to consider the matters having to do with the conduct of the election. Citing an Illinois case, the court explained that an equity court may consider matters which would normally be raised in a bond election contest in a later suit where the question of the fairness of the election is necessarily involved. The court here stated only that the suit was "timely brought," and therefore it is not clear from the decision whether such an action must be brought within the five day period provided for in Section 16-1202. As a result, this case further adds to the confusion as to the effect of the Arizona five day contest period.

There appears to be no applicable statutory contest period for bond elections in Colorado. Insofar as Florida is concerned, *Florida Statutes Annotated* Section 100.321 provides for the bringing of a suit to test the legality of bond elections. This section provides that the suit must be instituted within 60 days after the declaration of the results of the election or by way of intervention in a validation proceeding which has already been instituted for the purpose of procuring a judicial validation of the

bonds at issue. In Idaho Section 34-2001A of the *Idaho Code,* similar to the Florida statute, specifically provides for a suit challenging the validity of a bond election and similarly is specific in its provisions for a contest period, stating that such a suit must be brought within 40 days of the date of the canvass and declaration of election results. Louisiana is specific in this regard also providing in *R.S.* 39:518 that a suit to challenge a bond election must be instituted within 60 days of the date of the promulgation of the results of the election.

Michigan, like Colorado, appears to provide no relevant contest period, whereas Montana clearly provides that no action can be brought to restrain the issuance and sale of the bonds of various political subdivisions after the expiration of 60 days from the date of the order authorizing said issuance and sale. *Montana Revised Statutes* Section 93-2612.

While the Nevada statutes do provide contest periods for various types of elections, there appear to be no statutory provisions applicable to elections in general or to bond elections in particular. In New Mexico it is provided in *New Mexico Statutes 1953* Section 14-8-16, concerning the general category of municipal elections in New Mexico, that any action contesting "any question placed on the ballot" shall be maintained only if it is instituted within 30 days after the issuance of a certificate or notification of the results of the election by the municipal clerk. This contest period might apply to bond elections, however, the general bond provisions of the statutes (Sections 14-29-1 to 14-29-9) make no specific reference to it.

The New York laws are not very clear on this subject of bond election contest periods either. While *Election Code* Section 330 (5) provides that a "voter" may chal-

lenge the canvass of returns within 30 days after an alleged erroneous statement or determination is made, this section is a general one not specifically concerned with bond elections. Additionally, *Local Finance Code* Sections 80 to 83 permit the local finance board to adopt a resolution which, in effect, creates a twenty day contest period within which the validity of municipal obligations can be contested. Therefore, there might be two contest periods applicable to a given bond issue. To further confuse matters, the twenty day period does not appear to cut off constitutional rights, thereby rendering the expiration of this period as somewhat ineffective insofar as it tends to establish the complete validity of the obligations. The most specific section of the *Oklahoma Statutes* concerning bond elections would appear to be Section 13 of Title 62 which specifically concerns munipical bonds and states that the bond commissioner shall issue a certificate approving a bond issue after examining into and passing upon the bonds to be issued. It then provides that the bonds shall be incontestable in any court in the state of Oklahoma unless suit thereon shall have been brought within 30 days from the date of the bond commissioner's approval.

Rhode Island does not appear to have any statutory provisions relating to bond election contest periods. In Texas, *Election Code* Article 9.03 contains a general section requiring that notice of an election contest must be brought within 30 days of the return day of the election. In Utah, Section 11-14-12 of the *Utah Code Annotated*, specifically provides for bond election contests and allows such contests to be brought within 40 days after the returns of the election are canvassed and the results thereof declared. Finally, in Wyoming it is provided in *Wyoming Statutes* Section 22-323 that insofar as elections held in

Wyoming counties, cities, or towns are concerned, any five "electors" may contest an election upon any subject which may by law be submitted to a vote of the people within 30 days after the result of the election has been determined.

Inasmuch as it is not altogether determinable without further litigation whether under most state laws there was any time for challenging the election result which could have expired on June 16, 1969, under the language in the *Cipriano* opinion, it is submitted that this court has the opportunity in this case to set at rest questions of uncertainty arising from the above quoted language from the *Cipriano* opinion as to revenue bonds and to establish guidelines which will determine the same questions as to general obligation bond elections without the necessity of further extensive litigation.

As pointed out above, there are some states where no bond election contest period is applicable. As to bond elections held in those states, the question is presented under the prospective language of the *Cipriano* opinion whether a bond election held five, ten or even fifteen years ago may be attacked on voting restriction grounds. A difficult question has also been posed where bonds were issued in series, so that on June 16, 1969 part of the bonds voted at an election were in the hands of purchasers but part of the voted bonds were still unissued and unsold. The *Cipriano* opinion makes clear that the bonds which were actually delivered cannot be attacked, but it does not answer the question of whether or not the bonds remaining unissued are subject to attack under the rationale of the *Cipriano* and *Kramer* decisions. The result is to place political subdivisions in states which have no contest period under a disability not shared by the other states which do have a contest period.

In the *Cipriano* opinion this Court, after referring to the time for challenging the election under state law, added the following sentence: "Thus, the decision will not apply where the authorization to issue the securities is legally complete on the date of this decision." 395 U.S. at 706. As generally understood with respect to the issuance of municipal securities, the reference to the authorization to issue the securities becoming legally complete would not necessarily mean the same as a reference to the expiration under state law of the time for challenging the election result. "Authorization" is sometimes considered to refer to adoption of a bond ordinance specifically describing the particular series or issue of bonds currently to be sold, especially where reference is made to such authorization becoming legally complete. In the interpretation of the language of the *Cipriano* opinion, the question is thus raised whether, by the addition of the reference to the authorization being legally complete, this Court was referring to the expiration of the state contest period only and equating "legally complete" to such expiration, or whether the court was suggesting a different and additional test. It can be seen that this makes considerable difference in a state where there is no applicable bond election contest period, or where the state law is not clear as to the application of election contest periods generally to bond elections. In such states there is no way of knowing exactly what concept this Court had in mind when it spoke of "legally complete". The result is to throw into question bond elections held in those states before June 16, 1969 and to pave the way for future litigation.

In the states where a contest period can be thought to apply to a bond election, the language of the Cipriano opinion does not make clear whether, when the contest period expired after June 16, 1969, the revenue bond

election was void, or merely voidable if the question of the application of the *Cipriano* case to the election is actually raised in a court before the state contest period expires.

As an example, the May 27, 1969 general obligation bond election held in Parish-Wide School District of Caddo Parish, Louisiana has not been challenged in the courts and the peremptive period provided by the Louisiana constitution and statutes has expired, but under the decision of the lower court in the question as to the validity of the general obligation bond election is kept open since the election contest had not expired on June 16, 1969. This situation illustrates the confusion arising from the language used in the *Cipriano* opinion and the fact that many political subdivisions will not be able to proceed to issue previously vetoed general obligation and revenue bonds unless such language is clarified.

In the *Cipriano* language quoted *supra,* this Court referred to the fact that its opinion would be applied retroactively in cases brought within the time provided by state law for challenging the election and which were not yet final on June 16, 1969. Several instances have arisen where, on June 16, 1969, litigation, on grounds other than constitutional grounds dealt with in the *Cipriano* opinion, was pending as to general obligation bond elections. The litigation in such instances was concluded and the appropriate appeal periods expired after the date of the *Cipriano* opinion without the question being raised that the elections involved were limited to property owners or taxpayers. Again the question is presented where such litigation was pending on June 16, 1969, whether the general obligation bond election was thereby voided or was it only made voidable if the applicable date is June 16, 1969.

That is, in those instances was the bond election made subject to attack on *Cipriano* grounds at any time in the future, or was the result of the *Cipriano* decision merely that until the litigation became final *Cipriano* grounds could be utilized and the bond election voided, but that once the state contest or appeal period had passed without such challenge, the bond election was valid and not subject to attack on federal constitutional grounds?

Pending in this court on writ of certiorari from the Supreme Court of Louisiana is *Chambers* v. *Road District No. 505 of Tangipahoa Parish, Louisiana,* Number 1133, October Term, in which is presented to this court some of the questions raised above. Possibly involved in such litigation is the validity of a state contest provision under the federal constitution and the question of whether or not federal rights are denied by the application by the states of such a contest provision after June 16, 1969. Even as to the Louisiana contest provision, an early federal decision indicated that the passage of the state period might not serve to cut off federal rights in the federal courts.[1] A further constitutional problem inherent in this area is the reasonableness of the time permitted under state law for the challenge of the bond election result. While this court might find that the 60-day period provided under Louisiana Law, running from the publication in a local newspaper of the promulgation of the proces verbal of the election, might satisfy federal constitutional requirements, query, does the passage of the 5-day period provided by *Arizona Revised Statutes,* Section 16-1202 and Section 16-1204, satisfy constitutional standards of federal due process even if made applicable to bond elections by the Arizona Supreme Court?

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[1] Wight v. Police Jury of Parish of Avoyelles, La., 264 Fed. 705 (5th Cir. 1919).

The above questions are certain to be raised in this Court, but such litigation can be avoided if the uncertainties surrounding the language of the *Cipriano* opinion can be dealt with and guidelines adopted governing the prospective application of the decision.

Amicus Curiae therefore respectfully requests this Court to consider the following as the basis for any prospective ruling included in the affirmance of the decision of the lower court.

Ideally, the least confusion, and the most clarification could be obtained by a decision of this Court holding that all bond elections held prior to the affirmance by this Court of the lower court decision may not be subjected to attack on the ground that the law under which the election was conducted limited the right to vote to taxpayers only, irrespective of such grounds as might still exist under state law for the challenge of the election. This would forestall all challenges to bond elections theretofore held and would be a truly prospective application.[2]

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[2] As this brief was being completed word was received that a three-judge court in the United States District Court, Eastern District of Louisiana, New Orleans Division, in a case styled *Stewart et. al.* v. *the Parish School Board of the Parish of St. Charles, and School District No. 1 of the Parish of St. Charles*, Civil Action No. 69-2818, Section "E", on February 25, 1970 held invalid a September 23, 1969 general obligation bond election. In that case the result of the bond election was promulgated on October 2, 1969, and the litigation was instituted on November 21, 1969, within the peremptive period provided for in Section 14(n) of Article 14 of the Louisiana Constitution. The ruling of the court that general obligation bond elections conducted after June 16, 1969 are subject to attack under the theory of the *Kramer* and *Cipriano* cases reenforces and re-emphasizes the necessity of this Court in this appeal providing in definite terms a uniform date of application of its holdings in all states as to the two types of bond elections.

Recognizing, however, the necessity of consistency in the application of the decisions treating revenue bonds and general obligation bonds but nevertheless recognizing the importance of not applying June 16, 1969, as the determining date as to general obligation bond elections, and recognizing that the Court may not now wish to base the prospectivity of its opinion in this case solely on the question of whether or not the election was held before the date of the opinion, the following is offered for consideration by this Court.

First should be considered all elections on the issuance of general obligation bonds held prior to whatever new date is fixed by this Court in its opinion in this case, and in respect of elections held prior to June 16, 1969, on the issuance of general obligation bonds. Because of the problems pointed out above with respect to the application of the *Cipriano* opinion to revenue bonds, it is submitted that it will be of great help to the states and political subdivisions involved if this Court should treat both general obligation bond elections held prior to the new date fixed by this Court and revenue bond elections held prior to June 16, 1969 as being subject to the same test. As to such elections held prior to June 16, 1969 or, as the case may be, the new date, it is respectfully submitted that the Court hold that unless the bond election had been challenged on the grounds non-taxpayers were not permitted to vote, prior to the expiration of a determinable state contest period or in states where there is no determinable period prior to the date of the decision affirming the lower court, whichever date is *earlier,* then such decision will not be applied retroactively under any circumstance. Such a holding would mean that as of the date of the new opinion all states would be treated exactly the same and all general obligation and revenue bond issues voted before June 16, 1969,

then unchallenged could be issued, and would also preserve the rights of those plaintiffs who, prior to the date of such decision, had challenged the bond election in question on the ground that non-taxpayers were not permitted to vote.

Second should be considered general obligation bonds issued and delivered to the purchasers thereof prior to the date of the opinion affirming the decision of the lower court. It has been uniformly assumed that, irrespective of any future decision by this Court with respect to the application of *Cipriano* to general obligation bond issues, this Court would never hold that general obligation bonds actually delivered to the purchasers thereof prior to June 16, 1969, or prior to the new date selected by this Court in its opinion in this case, could be attacked. It is respectfully submitted to the Court that the applicable date should be the date of the new opinion and therefore that it hold that such opinion have no retroactive application to general obligation bonds, whenever voted, if issued and in the hands of the purchasers thereof on the date of its opinion affirming the decision of the lower court.

Third should be considered general obligation bond elections held since June 16, 1969. Few, if any, revenue bond elections have been held since the date of the *Cipriano* decision except in those states which have been able to change their laws so as to permit the holding of such bond elections at which all qualified electors might vote. There have been, however, elections held in many states since June 16, 1969 in which general obligation bonds were voted where only property owners or taxpayers voted. To avoid the problems inherent in the *Cipriano* opinion, it is respectfully requested that this Court hold that general obligation bonds voted at elections held since June

16, 1969, if unchallenged on the date of the opinion affirming the lower court in states where no determinable contest period is applicable, or unchallenged at the expiration of the state contest period in states which have determinable contest periods, whichever date is *later*, may not be later challenged on grounds only property owners or taxpayers were permitted to vote. Applying the decision prospectively as so suggested would mean that all states would be treated alike in that if the bonds are not challenged on such federal constitutional grounds by a determinable date such question may never be raised, but it would preserve rights previously asserted or which could be raised under state law during the contest period. A holding of this nature would mean that further litigation would not be necessary to determine the effect of the state contest period passage after the decision affirming the decision of the lower court.

Fourth should be considered bond elections held subsequent to the decision affirming the decision of the lower court.

Many of the state legislatures have begun the process of changing state law to conform to the requirements of this Court with respect to voter qualifications at revenue bond elections. This is, however, a process which has been considerably handicapped by the hiatus resulting from the fact that this Court was unable to decide the constitutional question with respect to general obligation bonds at the same time as it decided the constitutional question with respect to revenue bonds. As has been pointed out to the Court in the many briefs filed in this appeal and need not be reiterated here by citations, many of the state voting requirements are of a constitutional nature and apply equally as well to general obligation bonds as to revenue

bonds. Questions have been considered therefore whether before a legislature may pass a law permitting all qualified electors to vote at a bond election, constitutional taxpayer requirements must be removed by amendment, or whether the result of the decisions by this Court automatically removes such restrictions from the state constitutions. There are obviously time delays involved in the submission of the necessary constitutional amendments, the enactment of the necessary legislation changing existing laws and the institution of litigation for the purpose of determining under state law the validity of legislative enactments providing for elections at which all qualified electors may vote. This problem has been compounded by the fact of the uncertainty of whether this Court would apply the rationale of the *Kramer* and *Cipriano* decisions to general obligation bonds. Thus, some of the state legislatures which have met since June 16, 1969, were unwilling to pass the necessary enabling legislation providing for the elimination of the taxpayer vote qualification until this Court had concluded that such taxpaying requirements were invalid. Since it is well recognized that political subdivisions must have specific authority to hold and conduct bond elections and to issue and sell bond issues, as has been pointed out to the court in numerous other briefs in this case, municipal financing in the states which have the property tax qualifications has been virtually nonexistent since June 16, 1969. There is considerable doubt as to whether or not the necessary legislative changes can be made in many of the states so as to permit an early resumption of financing if the decision of the lower court is affirmed. This problem will become even more acute should the court fail in a decision affirming the lower court to indicate that many of the previously voted but unissued general obligation bond issues described above may be safely issued, since

no machinery will exist to permit resubmission of the propositions.

It is therefore respectfully requested that the Court consider some of the following ways of ameliorating its decision affirming the decision of the lower court so as to give the states time to change their laws to conform to such a decision, but nevertheless permit bond elections to be held during the interim and to permit bonds to be issued and sold under such authorizations. *Amicus Curiae* requests that a decision be announced in this case as quickly as possible so that bond issues which have been deferred may be issued and to the extent required the state legislative changes may be commenced. The Court might also consider adopting a rule that until January 1, 1972 bonds voted at elections held under existing laws where only taxpayers voted may nevertheless be issued, unless litigation challenging the validity of the bonds is begun prior to the issuance of those bonds and the delivery to the purchasers thereof, but that after January 1, 1972 such federal constitutional grounds would apply to all bond elections thereafter conducted. This timetable would permit many legislatures to deal with the problem at their regular sessions in 1971 and would avoid costly special sessions. In the alternative the Court might consider adopting a rule that until January 1, 1972, qualified non-taxpaying electors could complain of the denial of their right to vote at a bond election only if they could affirmatively establish that if all non-property taxpayers who were qualified electors had voted against the bond issue the bond election would have failed; and that if such a suit is not brought prior to the time of the delivery of the bonds then neither the bond election nor the bonds could thereafter be attacked on such grounds, but that after January 1, 1972 such federal constitutional grounds would apply to all bond elections thereafter conducted.

Political subdivisions, such as *Amicus Curiae,* must of necessity be involved in the implementation of far reaching, well planned and conceived programs which can be accomplished only by raising the necessary funds under the procedures and processes provided for that purpose under state law. For the court to decree a period of time during which public financing must cease and important programs be halted makes little sense, as it will work havoc in the orderly financing and fiscal operations of such political subdivisions. Courts, when announcing sweeping changes in the existing laws, have traditionally recognized this problem and have provided means whereby a transitional period could be utilized.[3]

Unless the person challenging the bond election can timely establish that the result of the election would have

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[3] Thus the attention of the Court is called to *State* v. *Martin,* 384 P.2d 833 (Wash., 1963), a landmark case discussing the prospective overruling of prior decisions, but nevertheless preserving the validity of bonds issued and to be issued. Also illustrative of this approach of sustaining the viability of existing enactments are *State* v. *Community School District,* 78 N.W.2d 86 (Iowa, 1956) and *DeBerg* v. *County Board of Education,* 83 N.W.2d 734 (Iowa, 1957). In each case the Iowa Supreme Court initially declared the creation of school districts to be void, but in supplemental opinions ordered that the districts as created be allowed to operate as de facto entities for one year, to permit administration of the various schools. Similarly, in *Meyer* v. *Campbell,* 152 N.W.2d 697 (Iowa, 1967) and in *Mandicino* v. *Kelly,* 158 N.W.2d 754 (Iowa, 1968), the Iowa Supreme Court invalidated apportionment statutes governing certain local political subdivisions. The court nevertheless refused to enjoin the acts of the boards involved for at least a period of time sufficient to enable the state legislature to provide new enabling legislation, citing in one case as authority for so doing the opinion of this Court in *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1392, 12 L.Ed.2d 506.

been changed had he and the other members of his class been permitted to vote should not bonds voted under existing state procedures be permitted to be issued without doubt arising as to the constitutionality of such bonds? The principle that persons challenging bond elections must establish that the result would have been changed is well established,[4] and it is submitted could be properly adopted by this Court. It is therefore requested that this Court consider the serious problems facing the states in changing their laws and constitutions in order to conform to a decision affirming the decision of the lower court, and to permit an orderly transition to take place during which bond elections may be conducted and bonds validly issued.

CONCLUSION

If this Court should affirm the decision of the lower court an opportunity exists to forestall much future litigation affecting both general obligation and revenue bond elections. This can be accomplished by a speedy decision which makes unmistakable that the decision applies prospectively only. Several alternative suggestions are respectfully presented for the consideration of the Court as to the prospective nature of the opinion. In addition the desirability of providing a transitional period during which bond elections could continue to be held and bonds issued pending the making of the necessary legislative changes seems apparent. The Parish School Board of Caddo Parish, Louisiana, desires to discharge its duties

[4] See for example *Duncan* v. *Vernon Parish School Board*, 226 La. 379, 76 So.2d 403 (1954) and *Henley* v. *Elmore County*, 242 P.2d 855 (Idaho, 1952).

and responsibilities toward the community and the students of the school system, but it will be unable to do so pending the decision in this case. A speedy decision is therefore urgently requested.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel for *Amicus Curiae,* the Parish School Board of Caddo Parish, Louisiana, as the governing authority of Parish-Wide School District of Caddo Parish, Louisiana, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this ..... day of February, 1970

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